IN THE

Supreme Court of the United States

No. 431.

H. T. POINDEXTER & SONS MERCHANDISE COMPANY,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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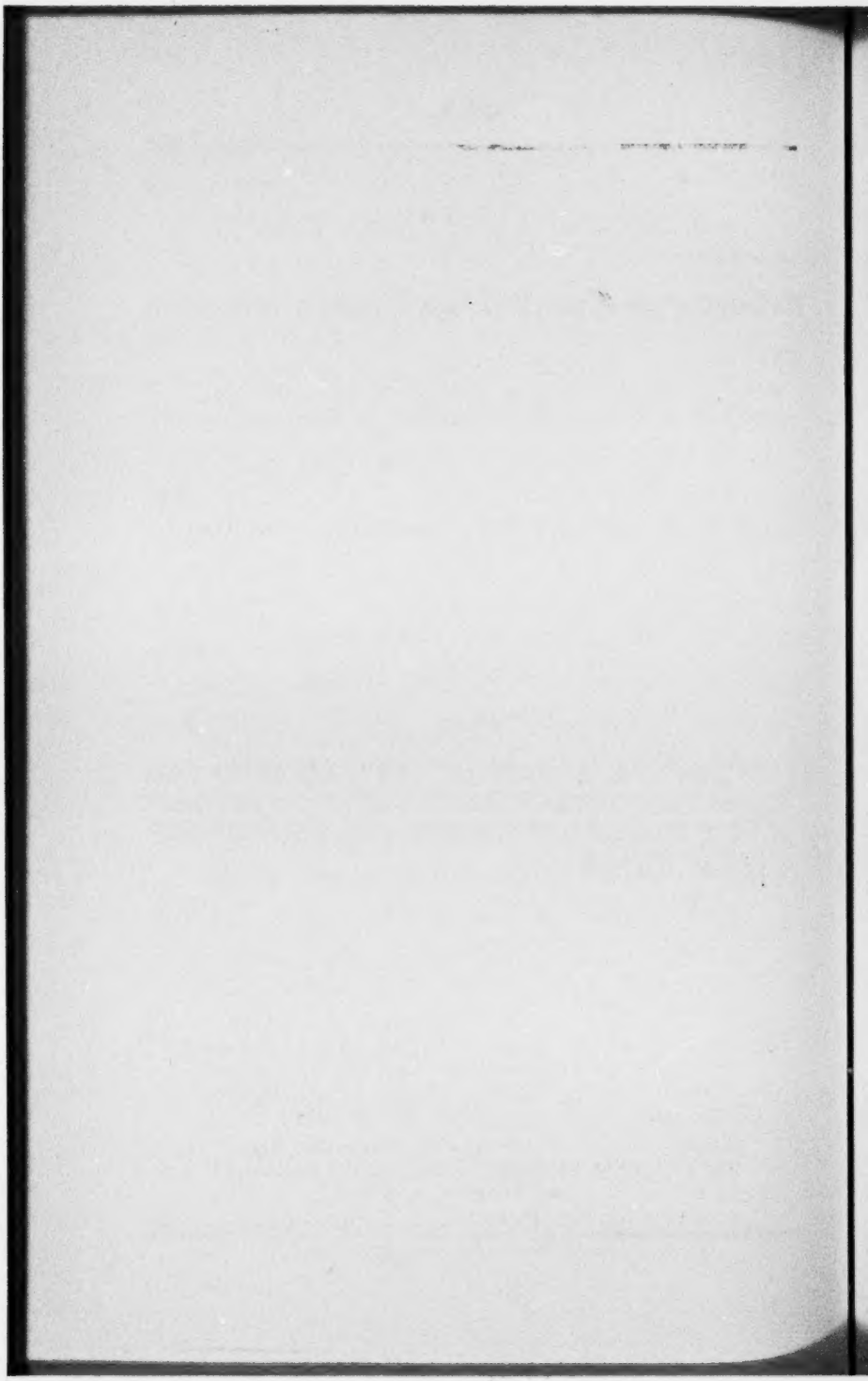

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

H. T. Poindexter & Sons Merchandise Company, a Missouri corporation, prays that a writ of certiorari issue to bring before this Court for review a Judgment rendered by the United States Circuit Court of Appeals for the Eighth Circuit reversing a judgment of the United States District Court for the Western District of Missouri in favor of the petitioner in the amount of $44,976.22 on account of floor stocks taxes paid under the Agriculture Adjustment Act, which Act was held unconstitutional in *United States* v. *Butler,* 297 U. S. 1. The Congress provided recovery procedure in the Revenue Act of 1936, Title VII (49 Stat. 1648).

JURISDICTION.

The Judgment of the United States Circuit Court of Appeals for the Eighth Circuit reversing the judgment of the District Court in favor of petitioner was entered on June 30, 1942 (R. 74). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended (U. S. C. A. 28-347).

DECISION OF THE CIRCUIT COURT OF APPEALS.

The decision of the United States Circuit Court of Appeals for the Eighth Circuit, reversing the United States District Court for the Western District of Missouri will be found in the record on pages 67 to 74, inclusive, and is reported in 128 F. (2d) 992.

The opinion of the District Court will be found in the record on pages 47 to 54 inclusive, and is reported in 40 F. Supp. 787.

STATEMENT OF THE MATTER INVOLVED.

This action was commenced by suit in the United States District Court for the Western District of Missouri to recover floor stocks taxes paid to the United States by the petitioner under the Agriculture Adjustment Act of May 12, 1933, C. 25 (48 Stat. 31 and particularly Section 16 thereof, 7 U. S. C. A. par. 616), upon petitioner's August 1, 1933, inventory of cotton content merchandise held for sale on that date.

Petitioner contended that it had borne the burden of the tax and had not shifted the burden in any manner. Petitioner is engaged in the wholesale dry goods and general merchandise business, including the sale of cotton content merchandise.

The Government in its answer admitted that the tax had been paid and that claim for refund had been duly filed and rejected; it was denied that petitioner had borne the burden of the tax. The Government stated it did not have sufficient knowledge to form a belief as to the truth of the facts al-

leged by petitioner in its complaint showing that it had borne the burden of the tax.

The petitioner then moved for Summary Judgment in its favor under Rule 56, Federal Rules of Civil Procedure, upon the pleadings; supporting the Motion with affidavits based on knowledge and certified copies of records (R. 1 and 6 and 7 to 40 incl.).

The Government thereupon filed its own Motion for Summary Judgment (R. 46) with no supporting affidavits.

The trial Court, after a hearing, sustained petitioner's Motion for Summary Judgment and denied the Government's Motion, and judgment was entered for the petitioner.

The Trial Court's opinion showing its grounds for granting petitioner's Motion is reported at 40 F. Supp. 787 and in the record at 47 to 54, incl.

The Government appealed and the District Court was reversed with direction to dismiss.

The District Court made findings of fact with which the Appellate Court did not disagree, the only difference being in the conclusion of law as to whether the burden of the tax was borne by the petitioner.

The Circuit Court disregarded the proof showing the reasons for and the explanation of petitioner's price increase and held that (R. 73):

> "The concrete definitely controlling consideration therefore is the established fact that the inventory valuations and the prices were raised coincident with the tax, and by the collection of the increased prices the tax was passed on."

The Circuit Court did not follow the law as established by the decisions of other Federal courts wherein it has been held repeatedly that if it is shown that *the price increases were based on factors other than the tax, the burden of the tax was not shifted.*

The Circuit Court also did not follow the law as established by the decisions of other Federal courts that where the inventory value of the merchandise has not been realized upon the sale of the merchandise after August 1, 1933, then the tax burden has not been shifted.

The opinion of the Circuit Court, if allowed to stand, will effectively prevent, at least in the Eighth Circuit, any refund of taxes where there has been a selling price increase because the Court's ruling establishes as a conclusive presumption that the tax burden was shifted when there is an admitted price increase, the Court holding (R. 72):

> " * * * But where they (taxpayer) immediately *increased their prices* sufficient to cover the former prices of the articles, plus the amount of the tax, they *manifestly shifted the burden* to the customers." (Italics supplied.)

The opinion and the conclusion of law as decreed denies rebuttal and totally disregards the uncontradicted facts of record showing the reasons for the increase, namely:

1—Neither inventory, book, departmental, group or item cost of petitioner's merchandise was increased for the tax or any part of it;

2—Petitioner's department managers in charge of pricing never were instructed to, and they did not after August 1, 1933, increase or include in the prices asked any amount to cover this tax as a separate item, nor was it included in the price asked or received or attempted to be collected from the purchasers;

3—Petitioner's selling costs, salary and overhead expenses were increased by $29,896.19 in the latter part of 1933 over a like period in 1932, and the bad debt charge-off in 1933 exceeded by $58,166.58 the charge-off for the year 1932;

4—Petitioner, in 1933 in connection with the sale of the merchandise, advertised that its selling prices did not include the tax and that the tax burden would be absorbed and borne by the petitioner;

5—Petitioner's selling prices in June and July, 1933, were sub-normal due to necessity of raising cash to meet overdue bank loans; and the change in selling prices in August, 1933, was to reverse this subnormal

pricing and to price the merchandise on the regular pricing basis;

6—The market value of petitioner's inventory on July 30, 1933, the day preceding the tax date, was not realized on the sale of the merchandise subsequent to August 1, 1933.

7—The floor stocks tax never was a factor in determining the selling prices or the changes made after August 1, 1933.

The above facts were alleged in petitioner's complaint, established by the evidence (R. 7 to 40 incl.), stated as facts by the Trial Court in its opinion (R. 50, 51, 53 and 54) and repeated by the Circuit Court (R. 68, 69 and 71) in its statement of the case.

NEVERTHELESS, the Circuit Court held that the *single fact* that prices were increased was controlling, sufficient and conclusive that the tax burden was shifted by the petitioner and established a conclusive presumption against the petitioner.

The Court disregarded the explanation of the price increases as shown by the facts of record as above enumerated; that the floor stocks tax was never a factor in determining the selling price, that it was not intended by petitioner that the tax was to be passed on to the customer but it was to be borne by the petitioner and that the selling price change or increase was based on factors other than the tax and the tax was not included in the selling price or collected from the customer in any manner.

Therefore, the Eighth Circuit Court of Appeals, contrary to the applicable statutes (Section 902, 49 Stat. 1648—See appendix) and to the decisions of other Federal courts on an identical question, by this opinion has established as conclusive and unrebuttable *a presumption that an increase in selling prices at the incident of the floor stocks tax manifestly included the tax in the price* and *the collection of the selling price passed the tax on to the customer even though the price increase admittedly was caused by and based on factors other than the tax itself.*

QUESTION.

A.

The Selling Price of Cotton Merchandise Was Increased After the Floor Stocks Tax Became Effective. Did this Increase Raise an Unrebuttable Presumption that the Tax Burden Was Passed on?

1. The Government has defended floor stocks tax refund suits by so contending that an unrebuttable presumption is established.

2. The Circuit Court, in the instant case, agrees with Government's contention and answers the question in the affirmative.

3. Other Federal courts have held no presumption exists since it would result in giving to Section 902 (*supra*) an arbitrary and unreasonable effect and would render nugatory the act of Congress and the decision of this Court in *United States* v. *Butler* (*supra*).

B.

Does the Mere Increase of the Selling Price Subsequent to August 1, 1933, in Order to Recover the Market Value of the Cotton Goods Before the Tax Became Effective Operate to Shift the Burden of the Tax to the Customer?

1. The Circuit Court, in the instant case, holds that the taxpayer *manifestly* shifted the burden of the tax to the customer in the increased price (R. 72, 73).

2. *C. B. Cones & Sons Mfg. Co.* v. *United States* (C. C. A. 7th), 123 F. (2d) 530, under such circumstances, holds the burden was not shifted, (from the opinion) (p. 534):

> "* * * we do not see how it can be logically contended that the plaintiff has obtained relief through the shifting of its burden merely by increasing its selling price so as to permit recovery of the actual market value of its product."

3. The Circuit Court, in the instant case, made this observation (from the opinion) (R. 73):

> "The taxpayer has stressed the decision of the Seventh Circuit Court in C. B. Cones & Sons Mfg. Co. v. United States, 123 F. (2d) 530, as compelling a contrary conclusion, but the facts presented in that case are distinguishable and *it is not controlling here.*" (Italics supplied)

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

I.

At the present time there is a conflict between Circuit Courts of Appeal on the nature and extent of the burden of proof placed on the taxpayer by Section 902 (*supra*).

II.

The Circuit Court of Appeals for the Eighth Circuit in the instant case has decided a Federal question in a way in conflict with applicable decisions of other Federal courts.

III.

The Circuit Court of Appeals for the Eighth Circuit has decided an important question of Federal law which has not been but should be settled by this Court.

IV.

Title VII of the Revenue Act of 1936 is unconstitutional as construed by the Circuit Court of Appeals for the Eighth Circuit in the instant case, since failure to permit the recovery of the market value of the inventory on the day preceding the tax is an actual injury to the petitioner, as real as though he were being derived of his property for less than its fair market value.

Reasons I and II.

There is a Conflict Between Federal Courts on an Important Federal Question.

The Eighth Circuit Court of Appeals, in the instant proceedings, as a conclusion of law decided that the petitioner had shifted the burden of the floor stocks tax because the petitioner increased its selling prices. The Court refuses to consider either argument or facts to rebut its conclusion; *the Court thus establishes a conclusive presumption.*

(From the Court's Opinion)

(R. 73) "the *concrete definite controlling consideration* therefore is the established fact that the inventory valuation and the prices were raised coincident with the tax and by the collection of the increase price, the tax was passed on."

(R. 72) "But where they immediately increased their prices sufficiently to cover the former prices of the articles plus the amount of the tax, *they manifestly shifted the burden* to the customer." (Italics supplied)

The Court's opinion disregards the admitted factors which actually caused the price changes, which factors were the motivating force behind and substantial reasons for and explained and justified the price advance. These undisputed facts clearly revealed that the price advances were caused by factors other than the tax. (See enumerated facts in the District Court's Opinion, R. 50, 51, 53 and 54, and in Circuit Court's statement of the case, R. 67, 68 and 69.)

The decision by the 8th Circuit Court is in direct conflict with the following decisions applying Section 902 (*infra*, appendix) and the taxpayer's burden of proof thereunder.

(A) 7th Circuit Court of Appeals,
C. B. Cones & Sons Mfg. Co. v. *United States* (*supra*).

(B) District Court of Maryland,
Hutzler Bros. v. *United States*, 33 F. Supp. 801.

(C) 4th Circuit Court of Appeals,

The *Hutzler Bros. case* (*supra*) arose within the jurisdiction of the 4th Circuit. However, the Government did not appeal. Nevertheless, the 4th Circuit Court in *Arkwright Mills* v. *Com.*, 127 F. (2d) 465, has quoted *C. B. Cones & Sons Mfg. Co.* (*supra*) with approval, which in turn quotes and follows the *Hutzler Bros. case* (*supra*).

(D) 3rd Circuit Court of Appeals,
Honorbilt Products v. *Com.*, 119 F. (2d) 797.

While this case resulted in a decision that the tax burden was shifted, the facts were that the unfavorable margins were not rebutted, and there was also evidence of a price increase. The Court, at page 798 in its Opinion, stated there was

> "* * * nothing in the record to show that the increase in price was due to any increase in the cost of raw materials, of labor, or of manufacture generally".

Reason III.

The above (Reasons I and II) discloses that a serious conflict exists between the decision for which review is herein sought and those of other Federal courts, and it is urged the questions raised be settled by this Court.

The Government itself should welcome a final and authoritative pronouncement by this Court on these questions.

The many taxpayers who have (1) claims pending with the Bureau of Internal Revenue; (2) cases before the Processing Tax Board of Review, and (3) cases pending and those to be filed in various District courts and the Court of Claims will know, if this Court will settle these questions, whether to proceed further or to abandon their claims for refund of taxes under Title VII of the Revenue Act of 1936 (*supra*).

From the Opinion in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, it is apparent that the Supreme Court realized that in some later case they would be called upon to settle questions concerning the extent of the taxpayer's burden of proof under Section 902.

This instant case, with its decreed conclusive presumption and the existing conflict with decisions of other Federal courts, presents the ideal situation for such a final determination by this Court. *Thereafter*, the Government, the taxpayer claimants and all the Federal courts would have a positive rule of law for the application of the burden of proof under Section 902 in processing and floor stocks tax refund actions.

Reason IV.

The Circuit Court has denied to the petitioner the right to recover the market value of the cotton goods the day preceding the effective date of the tax.

The wholesale market value from April to July, 1933, of cotton goods had risen almost vertically by 100 per cent, and by the last of July, 1933, the petitioner had a large potential profit in its inventory over cost.

Petitioner's June and July, 1933, selling prices were subnormal and below the wholesale replacement cost. Its selling prices were increased in August, 1933, but not in sufficient amount to realize the wholesale market value of its inventory as of July 30, 1933.

In *C. B. Cones & Sons Mfg. Co.* v. *United States* (*supra*), the 7th Circuit permits the recovery of this market value through a price increase and holds that the tax burden was not shifted; thus, the Circuit Court's ruling in the instant case is in direct conflict therewith.

In *Arkwright Mills* v. *Comm.* (*supra*), the 4th Circuit quotes with approval the *Cones case.*

Wherefore, that the writ of Certiorari should be granted is respectfully submitted.

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BRIEF IN SUPPORT OF PETITION.

Title VII, Sections 901-917 of the Revenue Act of 1936 (49 Stat. 1747, 7 U. S. C. A., par. 623, note 644-659), provides for the recovery of amounts collected under the Agriculture Adjustment Act.

Section 902 (7 U. S. C. A., par. 644) prescribes the conditions on which refunds shall be made, placing the burden on the taxpayer to establish that he has not passed on the tax or been relieved of the burden.

Section 905 (par. 647) provides that District Courts and the Court of Claims shall have jurisdiction for recovery of amounts collected as floor stocks taxes.

Section 907 (par. 649) establishes certain rules of evidence and presumptions to be used in administrative proceedings for recovery of amounts collected as processing taxes.

The Supreme Court in *Anniston Mfg. Co.* v. *Davis* (*supra*), held the recovery procedure constitutional.

Section 907 establishes presumptions, which can be rebutted, for processing tax recoveries. This section does not apply to floor stocks taxes and there are no presumptions established by statute for floor stocks taxes.

Despite the broad language of Section 902, it should not be construed as intended to deny a refund in any case where a claimant is constitutionally entitled to it—*Anniston Mfg. Co.* v. *Davis* (*supra*).

A.

EIGHTH CIRCUIT HAS ADOPTED THE GOVERNMENT'S DEMAND THAT UNDER SECTION 902 ANY INCREASE IN PRICE IS UNREBUTTABLY PRESUMED TO INCLUDE THE TAX WITH THE RESULTING SHIFTING OF THE TAX BURDEN.

In defending floor stocks tax recovery actions under Section 902, the Government repeatedly has urged upon the courts that

> "An increased selling price creates a presumption that the tax has been passed on."

The Court, in the instant opinion, is the first to adopt that proposition. This interpretation of the burden of proof under Section 902 is in conflict with rulings in other circuits, namely,

Hutzler Bros. v. *United States* (supra)

in which the Court held, p. 804:

> "The Government takes the position * * * ; that if the mere fact can be shown that prices have been raised any time subsequent to the imposition of the tax, then there is a presumption that the price increase was adopted to offset * * * the tax * * *"
>
> "But, of course, the obvious fallacy of such an argument is that it completely ignores the numerous other factors, which, as has been disclosed in this case, were the bases for the increased prices * * *"
>
> "One might give, ad infinitum, examples of the reductio absurdum of the theory which the Government is here asserting. *I know of no decision which goes to the length which the Government now asks this Court to go.* * * * The obvious result would be to defeat, by an arbitrary ruling of the Administrative branch of the Government, the very mandate of the Supreme Court in United States v. Butler, supra, to the effect that the tax was invalid." (Italics supplied.)

This refusal to establish a presumption as announced in the *Hutzler Bros. case* has been followed and quoted with approval in

1. 6th Circuit Court of Appeals,
   Cheek v. *United States,* 126 F. (2d) 3;
2. 7th Circuit Court of Appeals,
   C. B. Cones & Sons Mfg. Co. v. *United States* (supra);
3. District Court, California,
   La Yebona Co. v. *United States,* 1942 Prentice Hall, 62,546 (D. C. Calif.), appealed by United States, dismissed 127 F. (2d) 864.

B.

THERE WAS NO SHIFTING OF THE TAX BURDEN WHERE SELLING PRICES WERE INCREASED AFTER AUGUST 1, 1933, IN ORDER TO REALIZE THE MARKET VALUE OF COTTON GOODS ON JULY 30, 1933, THE DAY PRECEDING THE TAX.

The petitioner alleged in its petition, and the evidence revealed that the market value of the cotton content merchandise on July 30, 1933, was not realized on the sale of this merchandise subsequent to August 1, 1933, the date the floor stocks tax became effective.

In *C. B. Cones & Sons Mfg. Co.* v. *United States* (supra), on an identical proposition, the 7th Circuit held that the *tax burden was not shifted;* and the *Cones case* has been quoted with approval by the 4th Circuit in *Arkwright Mills* v. *Comm.*, 127 F. (2d) 465.

The facts of the *Cones case* were identical with those of the instant case in that (1) floor stocks tax recovery under Section 902 was at issue (2) there was a price increase in August, 1933 (3) while the August prices were higher than the July prices (4) the inventory Market Value as of July 30, 1933 was not realized.

This ruling of the 7th Circuit was called to the attention of the Circuit Court in the instant case, but disregarding it, the Court said (R. 73).

"* * * *it is not controlling here.*" (Italics supplied.)

The *Cones case* established that the mere increase of selling prices to recover the market value of the goods before the tax does not shift the burden of the tax to the customer.

In the *Cones case,* as in the instant case, the Government contended that there was a presumption that the tax had been passed on because of the price increase. This proposition was denounced by the Court in the *Cones case.*

That there is need for this question to be settled by this Court by granting this petition is further revealed by the fact that the three cases quoted by the Circuit Court in the instant case as supporting its announced "presumption" at Record page 73, are also the same three cases which the

7th Circuit Court in *C. B. Cones & Sons Mfg. Co.* (supra) at pages 533, 534 reviews and holds as not being authority for a "presumption."

These cases are *Honorbilt Products* v. *Comm.* (supra), *Luzier's, Inc.* v. *Nee* (infra), and *C. M. McClung & Co.* v. *United States* (infra). (Cases discussed hereinafter.)

Therefore, we have a most confusing and conflicting interpretation of the burden of proof under Section 902, the 8th Circuit in the instant case holding the above three cases supports its "presumption" and the 7th Circuit holding in the *Cones case* that these same three cases are not authority for a "presumption."

C.

THE CIRCUIT COURT EVOLVES A PRESUMPTION AGAINST PETITIONER UNDER TITLE VII.

There Are No Authorities for the Presumption Decreed by the Circuit Court.

This opinion in the instant case announced a foreign and startling doctrine in holding that an increase in selling price at the incident of the tax and the collection of the increased price shifted the burden of the tax, and that the single fact of the price increase is the

"concrete definite controlling consideration" (R. 73).

This pronouncement of this presumption is the first time such a judicial interpretation ever has been made of the taxpayer's burden under Title VII of the Revenue Act of 1936 and Sections 902 and 907 thereof (supra).

The petitioner has cited and quoted authorities herein in which "no presumption" was determined existing as a part of burden under Section 902.

The cases relied on by the Circuit Court in its Opinion (R. 73) *are not authority* for such a harsh and confiscatory application of the Congressional intent in establishing the burden of proof under Section 902. These cases relied upon (R. 73) are as follows:

Anniston Mfg. Co. v. *Davis* (supra), in which this Court, speaking through Mr. Chief Justice Hughes regarding the burden of proof under Section 902, said (at p. 351),

"Despite the broad language of Section 902, we do not think that it should be construed as intended to deny a refund in any case where a claimant is constitutionally entitled to it. * * *. When the Congress requires the claimant, who has paid the invalid tax, to show that he has not been reimbursed or has not shifted its burden, the provision should not be construed as demanding the performance of a task, if ultimately found to be inherently impossible, as a condition of relief to which the claimant would otherwise be entitled. There is ample room for the play of the statute within the range of possible determination. * * *"

Honorbilt Products Co. v. *Com.*, 119 F. (2d) 797 (3rd C. C. A.)

The Court cites this case as authority for its application of the presumption as the burden under Section 902. This case establishes no such principle of law, even though there was a price increase.

The case originated in the Processing Tax Board of Review, where relief was denied because of unfavorable margins under Section 907, which were not rebutted by the taxpayer; there was also evidence that the selling price had been increased. The 3rd Circuit affirmed the Board, however, making this reservation in its opinion (page 798):

"* * * The increase was more than sufficient to take care of the tax and *there is nothing in the record to show that the increase in price was due to any increase in the cost of raw materials, of labor or of manufacture generally.*" (Italics supplied.)

Therefore, the *Honorbilt case* even under Section 907, which establishes statutory margins, permits of proof to rebut the presumption.

Luzier's Inc. v. *Nee*, 106 F. (2d) 130 (8th C. C. A.).

This case involved a claimed overpayment of cosmetic excise tax. The facts were Luzier *collected* the excise tax from its customers in advance of payment; the amount was

understood between the parties to be for that purpose and was so paid by the customers. 10 per cent was added to the price and the sales invoice had a stamped notation:

> "Service charge covers increased income tax, increased postal rates, abandoned delivery charges, *excise taxes,* and emergency expenses."

Thus the facts of the case and basis of decision were totally dissimilar to those of the instant case.

> *C. M. McClung Mfg. Co.* v. *United States,* 33 F. Supp. 464 (Ct. Claims).

This is the last case cited by the Circuit Court. McClung purchased goods after August 1, 1933, and adjusted his selling price on the basis of new merchandise which included the processing tax. The taxpayer had paid a floor stocks tax on the goods he had on hand August 1. Some of the inventory was sold at the old price and some at the new which included the tax. The taxpayer offered no proof as to how much of the inventory was sold at the old price, and the Court held that in the absence of such proof, no recovery could be had for that portion of the inventory.

Therefore, neither the *Anniston, Honorbilt, Luzier* or *McClung cases* (supra) are authority for this new rule announced by the Circuit Court in the instant case.

The conclusion of law decreed by the Circuit Court that

> "an increase in selling price shifts the burden of the tax"

rests upon a wrong construction of law as applied to the controlling elements of the case and to the petitioner's burden of proof as contained in Title VII, Section 902, Revenue Act of 1936, and the judgment should be reversed.

WHEREFORE, that the writ of certiorari should be granted is respectfully submitted.

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APPENDIX.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

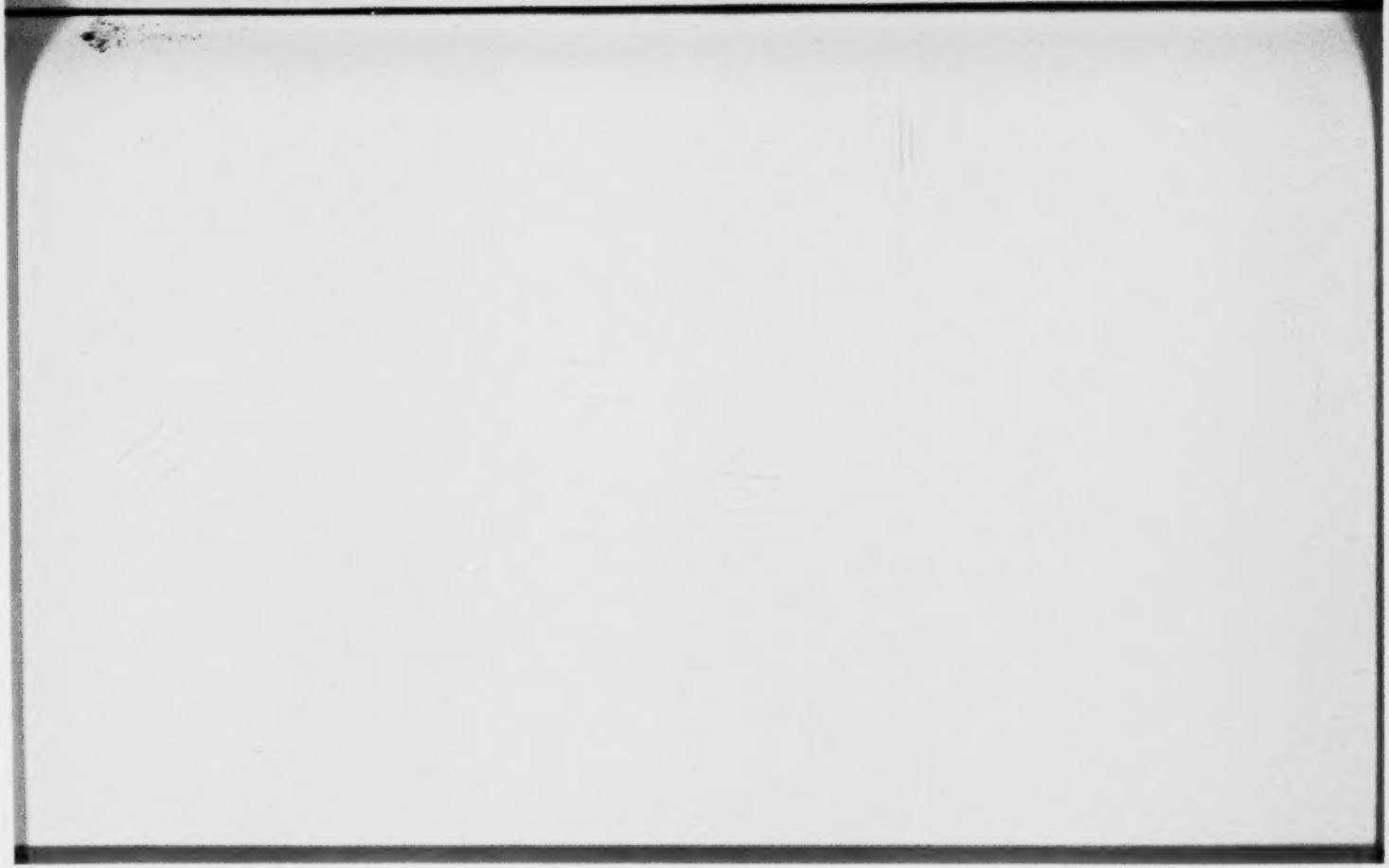
Title VII.

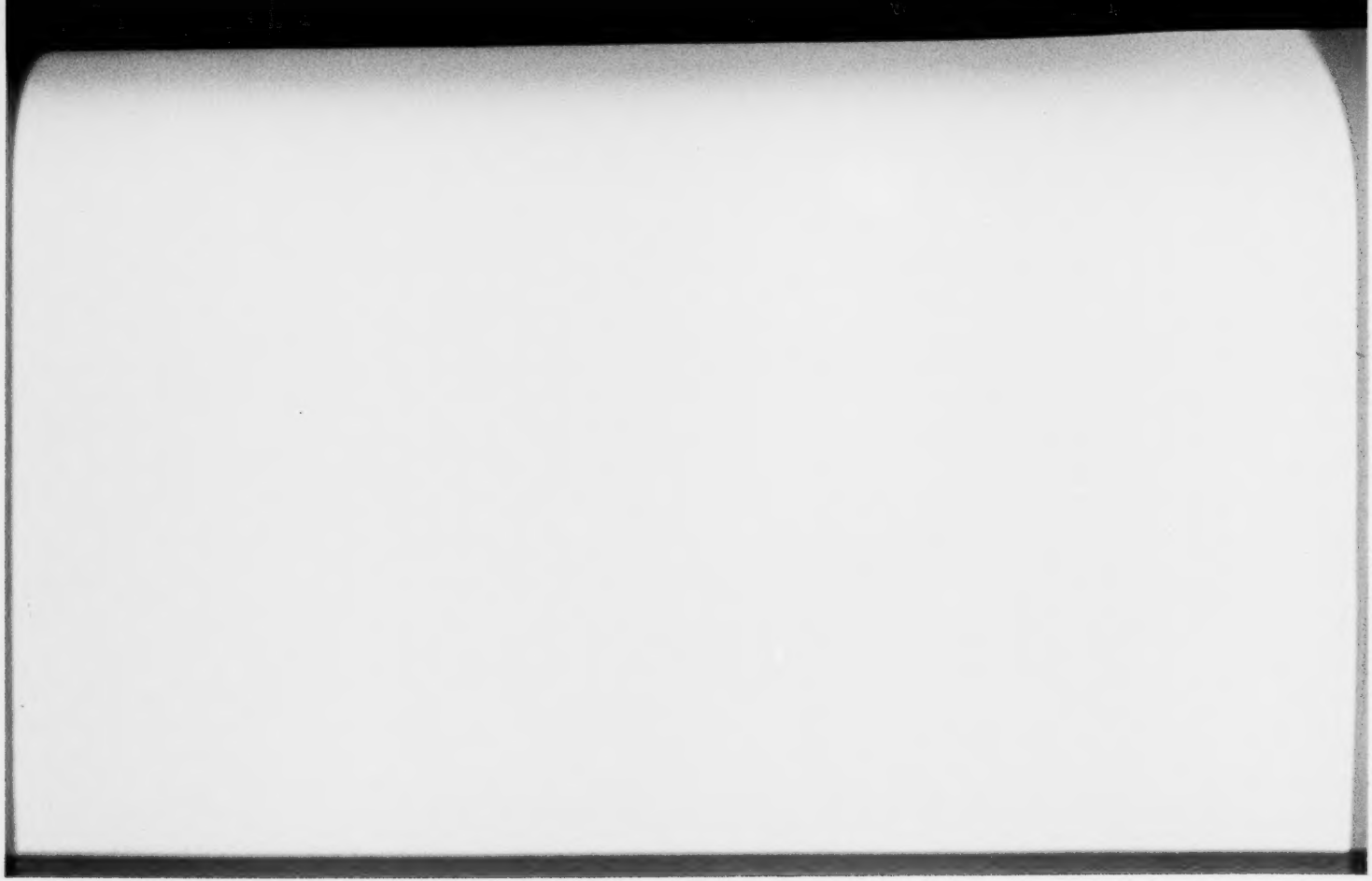
Sec. 902. Conditions on Allowance of Refunds.

No refunds shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (U.S.C. 1940 ed., Title 7, Sec. 644.)





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CITATIONS

489604—42

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 431

H. T. POINDEXTER & SONS MERCHANDISE COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Western District of Missouri (R. 47) is reported in 40 F. Supp. 787. The opinion of the Eighth Circuit Court of Appeals (R. 70) is reported in 128 F. (2d) 992.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 30, 1942 (R. 74), and the petition for a writ of certiorari was filed September 29,

1942. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Circuit Court of Appeals erred in holding that the evidence presented by the taxpayer was insufficient to establish, within the meaning of Section 902 of the Revenue Act of 1936, that it had not shifted to other persons the burden of a floor stocks tax, imposed under the Agricultural Adjustment Act of 1933.

STATUTES INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.
>
> No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—
>
> (a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through

inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof, or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (U. S. C., Title 7, Sec. 644.)

STATEMENT

Between August 31, 1933, and February 17, 1934, the taxpayer, which is engaged in the business of selling merchandise processed wholly or in large part from cotton, paid $44,976.22 in floor stocks taxes which were imposed pursuant to the Agri-

cultural Adjustment Act of 1933. After the Act was declared unconstitutional by this Court in *United States* v. *Butler,* 297 U. S. 1, the taxpayer brought this suit for a refund of those taxes pursuant to the provisions of the Revenue Act of 1936, c. 690, 49 Stat. 1648, Sec. 902; 7 U. S. C., Sec. 644. Taxpayer claimed that it had paid the tax, that it had neither passed the tax on to other persons in any way, nor been reimbursed therefor, and that it was, therefore, entitled to a refund (R. 1–6). The United States denied that the tax had been borne by the taxpayer and contended that therefore, no refund was allowable (R. 6–7). The taxpayer's motion for a summary judgment upon the pleadings, supporting affidavits, and copies of records was granted, and the United States' motion for a summary judgment was denied.

The District Court found that although the taxpayer had increased the prices of its merchandise on August 1, 1933, at the same time that the floor stocks tax became effective, this increase was ascribable to factors other than a desire to compensate for the burden of the tax. The factors found to impel the increase were: (1) the price of cotton-content merchandise for the preceding two months had been subnormal; (2) the cost of doing business increased after August 1, 1933; (3) the taxpayer's bad debts increased materially after August 1, 1933; and (4) there was a general increase

in the market prices or value of cotton-content merchandise (R. 53–54). Upon these findings of primary facts the court concluded that the taxpayer had not directly or indirectly shifted the burden of the tax to others (R. 54).

The Circuit Court of Appeals reversed the District Court's conclusion, holding that the evidence did not show that the burden of the tax had been borne by the taxpayer or had not been shifted to others (R. 74).

ARGUMENT

It is established that the taxpayer increased its prices on August 1, 1933. There is also evidence in the record to support the contention that this increase was due partly to causes other than the imposition of the floor stocks tax on that date (R. 16–17, 30). However, the taxpayer failed to establish that in fact the increase in prices did not include a sum which would cover the tax, over and above any amounts attributable to other factors. Thus, the taxpayer because of the unavailability of its sales invoices (R. 15–16, 33), was unable to show the price at which it actually sold its taxed inventory. Instead it resorted to a more generalized and less adequate calculation based on average prices on a portion of its inventory over the period between August 1, 1933, and December 31, 1933 (R. 31–36). The character of the increases and the elements of which they were composed were, therefore, not shown in any meaningful manner. *Cf. C. M. McClung & Co.* v. *United States,* 35 F. Supp. 464 (Ct.

Claims). And the evidence purporting to establish the "current market price" to which the taxpayer marked up its merchandise on August 1, 1933, does not show whether that price did not itself reflect the effect of the tax (R. 34–35). See *C. M. McClung & Co.* v. *United States,* 35 F. Supp. 464 (Ct. Claims); *Cf. C. B. Cones & Son Manufacturing Company* v. *United States,* 123 F. (2d) 530 (C. C. A. 7).

Against this background it is submitted that the Circuit Court of Appeals did not err in holding that the taxpayer failed to prove that it bore the burden of the tax within the meaning of section 902 of the Revenue Act of 1936. In requiring a more specific showing that the incidence of the tax was actually borne by the taxpayer the Circuit Court was consistent with the Third Circuit in *Honorbilt Products, Inc.,* v. *Commissioner,* 119 F. (2d) 797 (C. C. A. 3), which held that an inadequately explained price increase, itself sufficient to cover the tax, defeats recovery.

The asserted conflict with *C. B. Cones & Son Manufacturing Company* v. *United States,* 123 F. (2d) 530 (C. C. A. 7); *Arkwright Mills* v. *Commissioner,* 127 F. (2d) 465 (C. C. A. 4); and *Hutzler Bros.* v. *United States,* 33 F. Supp. 801 (D. Md.), rests on the assumption that the court below held that an increase in prices even though clearly attributable to other factors than the tax is sufficient to defeat recovery. However, the decision below

holds merely that the facts in this record do not establish that the increase in prices did not also compensate the taxpayer for the tax (R. 73–74). Under the statute the taxpayer is clearly obliged to establish this. Having failed to show with sufficient definiteness that the amount to which it increased its selling price was insufficient to cover its former selling price plus the tax or that it did not realize normal profits after the tax was paid, taxpayer has not carried the burden required by section 902.

CONCLUSION

The decision below is correct and there is no conflict. The petition for certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1942.

No. 431.

H. T. POINDEXTER & SONS MERCHANDISE COMPANY,
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v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

PETITIONER'S REPLY BRIEF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITIONER'S REPLY BRIEF.

THE FACTS ARE NOT IN DISPUTE.

The Poindexter affidavit (R. 10) and McManus affidavit (R. 30) prove the allegations of the complaint (R. 1) that the selling price increase was caused by factors other than the floor stocks tax.

This evidence was submitted with petitioner's Motion for Summary Judgment (R. 7) and was adopted by the United States in its Motion for Summary Judgment (R. 46).

The Court of Appeals did not disagree with the findings of fact made by the Trial Court.

In its brief (pp. 6, 7) the United States urges that the controversy was decided by the Court of Appeals on a mere question of failure of proof under Section 902.

This is not the situation presented to this Court. The Eighth Circuit held that under Section 902 the single fact of a price increase was the

> "concrete definite controlling consideration" (R. 73).

The United States repeatedly has urged that a mere increase in selling price served to shift the burden of the tax to the taxpayer's vendees; and this was urged in its brief before the Eighth Circuit in the instant case, as follows:

Brief for the United States before the Eighth Circuit, page 4,

> "Points and Authorities
>
> "2—Since the evidence shows that the taxpayer increased the price of its articles to an amount more than sufficient to cover the former prices of the articles, plus the amount of the tax sought to be recovered, it thereby shifted the burden of the tax to its vendees and cannot recover."

The Eighth Circuit in the instant case in its Opinion holds (R. 72),

> " * * * It is not necessary to declare there were no instances in which processors and owners of floor stocks bore the whole burden themselves. But where they immediately increased their prices sufficiently to cover the former prices of the articles plus the amount of the tax, *they manifestly shifted the burden to the customers.* (Italics supplied)

This ruling is in *direct conflict* with decisions of other Federal Courts on identical questions under Section 902, namely,

1. District Court of Maryland,
   Hutzler Bros. v. *United States,* 33 F. Supp. 801;
2. District Court of California,
   La Yebona Co. v. *United States,* 1942 Prentice Hall, 62, 546 (D. C. Calif.), appeal by United States, dismissed 127 F. (2d) 864;
3. 6th Circuit Court of Appeals,
   Cheek v. *United States,* 126 F. (2d) 3;
4. 7th Circuit Court of Appeals,
   C. B. Cones & Sons Mfg. Co. v. *United States,* 123 F. (2d) 530;
5. 4th Circuit Court of Appeals,
   Arkwright Mills v. *Com.,* 127 F. (2d) 465, has quoted *C. B. Cones & Sons Mfg. Co.* (*supra*) with approval, which in turn quotes and follows the *Hutzler Bros. case* (*supra*).

These above cases hold no presumption exists from a mere price increase, and further that where the evidence shows the floor stocks tax was never a factor in determining the sales prices but that the increase was caused by other factors, the burden of Section 902 has been adequately met.

In the instant case, the Trial Court detailed the facts causing the price increase (R. 50, 51, 53 and 54) and they were repeated by the Circuit Court in its statement (R. 67, 68 and 69).

By its ruling in the instant case, the Eighth Circuit also denies to the petitioner the right to increase its prices to recover the market value of the cotton content merchandise on July 30, 1933, the day before the tax became effective. This ruling is in direct conflict with the ruling in Seventh Circuit in *C. B. Cones & Sons Mfg.* v. *United States* (*supra*).

In both the Cones case and the Poindexter case Section 902 and identical facts are involved. The legal conclusions and rulings are in direct conflict with each other.

For reasons unknown to your petitioner, the United States did not seek review of the *Cones case.*

Petitioner herein now presents a conflict.

IMPORTANT PUBLIC QUESTION.

In its main brief (p. 10) the petitioner urges

> "The Government itself should welcome a final and authoritative pronouncement by this Court on these questions.
>
> "The many taxpayers who have (1) claims pending with the Bureau of Internal Revenue; (2) cases before the Processing Tax Board of Review, and (3) cases pending and those to be filed in various District courts and the Court of Claims will know, if this Court will settle these questions, whether to proceed further or to abandon their claims for refund of taxes under Title VII of the Revenue Act of 1936.

When the Congress was considering the Revenue Act of 1936 and the new Title VII thereof (refund section on Agriculture Adjustment Act taxes), the Senate Finance Committee in its report, pages 33, 34. stated

> "Necessity for Title VII
>
> " • • • "
>
> "The invalidation of the Agricultural Adjustment Act by the decision in the *Butler case* has given rise to possible claims for approximately $960,000,000 which has been collected under that act. This amount consists of approximately $850,000,000 in processing taxes; $98,000,000 in floor-stocks taxes; and $12,000,000 in compensating taxes. Processing taxes were paid by approximately 73,000 taxpayers; compensating taxes, by 75,000 taxpayers; and approximately 1,000,000 taxpayers paid floor stocks taxes. The possible number of claims, therefore, exceeds 1,000,000 • • •."

At this time there are pending in Federal courts a great number of cases on denied claims for refund of floor stocks taxes. There are now pending with the United States Processing Tax Board of Review more than 60 cases on denied claims for processing tax refunds, and many claims are still pending before the Bureau of Internal Revenue.

Therefore, the extent of all taxpayer claimants' burden of proof under Section 902, and particularly whether a price increase creates a presumption that the tax burden was shifted, is of importance to all courts and litigants.

CONCLUSION.

Until these questions are finally settled by this Court, a lack of uniformity between the various District Courts and Circuit Courts of Appeal will continue to exist.

This case presents an interpretation of a statutory restriction on the refund of an illegal and unconstitutional tax collection.

That Congress has the right to set restrictions is admitted, but conflict now exists in the Federal courts on the character and extent of these statutory restrictions; and until this Court settles these questions presented herein, they will continue to be applied by the Federal courts as well as administratively by the Bureau of Internal Revenue in a manner utterly lacking uniformity.

The Petition for Ceritorari should be granted.

Respectfully submitted,

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PETITIONER'S MOTION FOR REHEARING.

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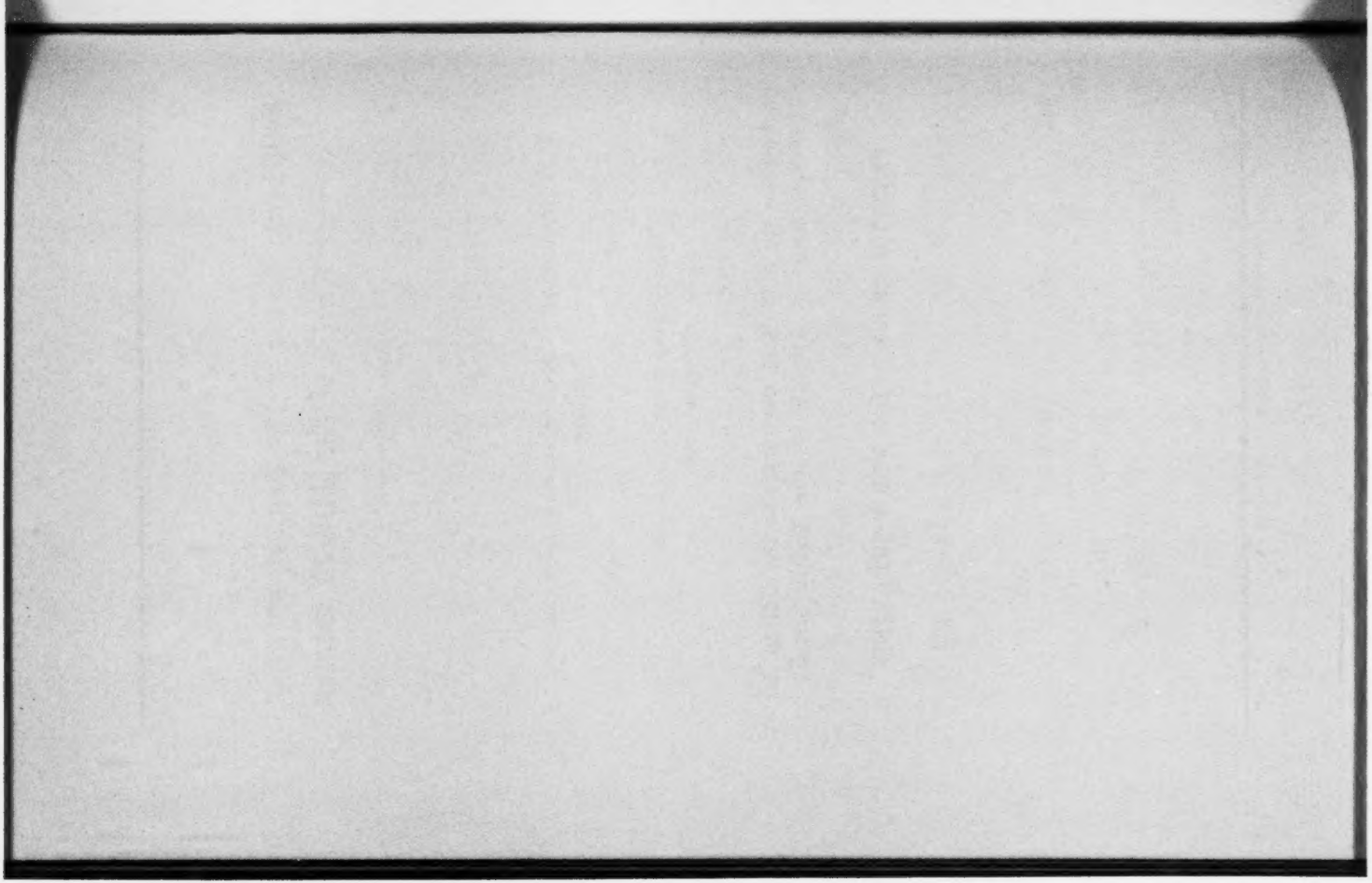

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PETITIONER'S MOTION FOR REHEARING.

The petition herein was denied by this Court on November 9, 1942.

It is respectfully requested that a rehearing be granted and that the petition be again considered and granted and for cause the petitioner shows:

1.

The question presented concerns solely the application of a statute of the United States:

Section 902 (page 18, appendix, main brief), Title VII, Revenue Act 1936.

The United States has collected as taxes under the Agriculture Adjustment Act over $960,000,000.00 (Senate Finance Report R. A. 1936—pages 33, 34). This Court held in *United States* v. *Butler*, 297 U. S. 1, that the Act was unconstitutional.

The amounts held by the United States became in effect *trust funds* which should have been returned immediately to the payor-taxpayers.

However, the Congress in the Revenue Act of 1936, Title VII (49 Stat. 1648) provided for certain factual conditions precedent before the monies would be returned to those who had paid the demanded tax.

2.

Decisions of the Federal Courts in the Fourth and Seventh Circuit Courts of Appeal (See cases—main brief, page 9) have construed Section 902 and the burden of proof required to be met by taxpayer claimant and these Courts have held that the *tax burden was not shifted* where:

(a) Selling price increase in August 1933 (date of tax) was caused by factors other than the tax.

(b) Selling price increase in August 1933 (date of tax) was to recover the wholesale market value of the goods as existing in July 1933; that is, the inventory profit before the tax date can be recovered by a price advance.

3.

The District Court (R. 51, 53, 54) in the instant case found as a fact, which was not disputed by the Circuit Court, that:

(a) Factors other than the tax caused the selling price advance.

(b) The tax was never a factor causing the selling price advance.

(c) The selling price advance was not sufficient to recover the wholesale market value of the goods as existing in July 1933.

4.

The decision of the Eighth Circuit in the instant case disregards the above decisions and facts and holds:

> "The increased prices manifestly shifted the burden of the tax and that the concrete definitely controlling consideration is the established fact that the selling prices were raised." (Court's Opinion R. 72 and 73)

5.

Therefore, the decision of the Eighth Circuit creates a *conclusive presumption* that under Section 902 an increase in selling price shifts the burden of the tax and conflicts with decisions in other circuits.

CONCLUSION.

It is, therefore, respectfully urged that equal protection under the laws and simple justice demands that a taxpayer claimant who in good faith paid without contest the demanded tax should not be penalized because he resides in the Eighth Circuit instead of the Seventh or Fourth Circuit boundaries of the Federal Courts.

Further, the remaining funds held by the United States are "trust funds" and the establishment and enforcement of a uniform application of the refund provisions of Title VII and Section 902 comes within this Court's definite jurisdiction.

WHEREFORE, that the rehearing be granted and Writ of Certiorari should be granted is respectfully submitted.

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